No. 77-1254

In the Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
APPELLANTS

v.

HOLBROOK BRADLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

PETER BUSCEMI,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

HERBERT J. HANSELL,
Legal Adviser,
Department of State,
Washington, D.C. 20520.

MICHAEL A. GLASS,
General Counsel,
International Communication Agency,
Washington, D.C. 20547.

INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the district court (J.S. App. 1A-8A) is reported at 436 F. Supp. 134. A prior opinion of the district court (J.S. App. 13A-24A) is reported at 418 F. Supp. 64.

JURISDICTION

The judgment of the district court (J.S. App. 9A-10A) was entered on October 14, 1977. A notice of appeal to this Court (J.S. App. 11A) was filed on

November 10, 1977. On December 28, 1977, the Chief Justice extended the time for docketing the appeal to and including February 8, 1978, and on January 31, 1978, Mr. Justice Brennan further extended the time to and including March 10, 1978. The appeal was docketed on that date, and this Court noted probable jurisdiction on May 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32.

QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, which requires persons covered by the Foreign Service Retirement System to retire at age 60, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 632 of the Foreign Service Act of 1946, 60 Stat. 1015, as amended, Pub. L. 94-350, 90 Stat. 846, 22 U.S.C. (1976 ed.) 1002 provides: [1]

[1] After this litigation began, but before the district court issued its final decision, Section 632 was amended by the Foreign Service Retirement Amendments of 1976, Pub. L. 94-350, 90 Stat. 846. The present version of Section 632, set forth here, does not differ in any material respect from the previous version.

> Any participant in the Foreign Service Retirement and Disability System, other than one occupying a position as chief of mission or any other position to which appointed by the President, by and with the advice and consent of the Senate, who is not a career ambassador shall be retired from the Service at the end of the month in which the participant reaches age sixty and receive retirement benefits in accordance with the provisions of section 821, but whenever the Secretary shall determine it to be in the public interest, such a participant may be retained on active service for a period not to exceed five years. Any such participant who completes a period of authorized service after reaching age sixty shall be retired at the end of the month in which such service is completed.

STATEMENT

Appellees are six former and four current Foreign Service employees in either the Department of State or the International Communication Agency (ICA),[2]

[2] Before April 1, 1978, the International Communication Agency was known as the United States Information Agency. It was renamed by Reorganization Plan No. 2 of 1977, 42 Fed. Reg. 62461. See also Executive Order No. 12048, 43 Fed. Reg. 13361.

Three appellees are former Foreign Service Information Officers and three are former Foreign Service staff employees of the United States Information Agency. Two appellees are currently employed as Foreign Service Reserve Officers with unlimited tenure in ICA. The remaining two appellees are Foreign Service staff employees in the Department of State.

and an organization representing such employees.[3] They filed this suit to challenge the validity of Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. (1970 ed.) 1002. Appellees contended that the requirement that Foreign Service employees retire at age 60 violated their rights under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. (and Supp. V) 621 *et seq.* ("ADEA"), the Due Process Clause of the Fifth Amendment, Executive Order No. 11141, 29 Fed. Reg. 2477, and applicable Civil Service Commission regulations. Appellees sought declaratory and injunctive relief against continued enforcement of the mandatory retirement provision. They also sought back pay and reinstatement.

The district court dismissed the primary non-constitutional claims, including the ADEA claim, on June 30, 1976 (J.S. App. 13A-24A). Appellees then abandoned their remaining non-constitutional claims. A three-judge district court was convened to consider the constitutional arguments.[4]

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[3] Although this organization, the Charles William Thomas Memorial Legal Defense Fund, purports to represent a large number of present and former Foreign Service employees, we are informed that the American Foreign Service Association, which is both the professional association of the Foreign Service and the elected representative of the Foreign Service employees of the Department of State, intends to file a brief as *amicus curiae* in support of appellants in this case.

[4] Because this suit was filed before August 12, 1976, it is not affected by Pub. L. 94-381, 90 Stat. 1119, which repeals most provisions requiring three-judge district courts.

In response to appellants' motion for summary judgment, appellees argued that decision of the constitutional question required the presentation of evidence to show that there is no rational basis for distinguishing between Foreign Service employees, who must retire at age 60, and Civil Service employees, who may continue to work until age 70.[5] Appellants contended that the constitutional issue was a question of law that could be decided without an evidentiary hearing. Although appellees never formally moved for summary judgment, the district court treated the case as if it had been submitted on cross motions for summary judgment.[6]

On the basis of affidavits from both sides and submissions in response to the court's request for supplementation of the record, the court declared the mandatory retirement provision of the Foreign Service Act unconstitutional (J.S. App. 1A-8A). The court acknowledged that "the distinction between Civil

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[5] On April 6, 1978, Congress enacted the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189. These amendments repealed the statute requiring most Civil Service employees to retire at age 70 (5 U.S.C. 8335(a)). The repeal will become effective on September 30, 1978 (92 Stat. 192). It does not affect the statute at issue in this case.

[6] During the hearing before the three-judge court, Judge Gesell and Judge Robb questioned counsel at some length about appellees' willingness to submit the case on the record as it then stood. The colloquy (Tr. 40-46) is less than pellucid, but it is plain that counsel for appellees did not formally request summary judgment.

Service and Foreign Service employees is proper if there is a rational basis to support it" (*id.* at 3A). It concluded, however, that "[o]n the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (*id.* at 3A-4A).

The court did not discuss the legislative history of the mandatory retirement provision. It considered instead the limited record evidence, measuring the proffered justifications for the challenged classification against the court's own assessment of the employment conditions of Foreign Service and Civil Service employees.

The court found that "less than ten percent of the American civilians who work overseas for the Government are forced to retire at age sixty" (J.S. App. 5A). It also determined that many of the overseas personnel not subject to early retirement have jobs similar to those of Foreign Service personnel and may be stationed in hardship posts. Finally, the court found that many Civil Service personnel spend significant portions of their careers abroad. The court concluded that a system under which some federal employees working abroad are "singled out" for early retirements is "patently arbitrary and irrational" (*id.* at 8A). The court therefore directed appellants to cease enforcing retirement at age 60 and to reinstate the individual appellees who had been involuntarily retired (J.S. App. 10A).[7]

[7] The court stayed the reinstatement portion of its order pending appeal (order of December 8, 1977).

SUMMARY OF ARGUMENT

This Court has held that a statutorily created mandatory retirement age for public employees must be sustained if supported by a rational basis. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307. The district court held that Congress acted unconstitutionally in establishing one mandatory retirement age for Foreign Service employees and another for Civil Service employees, including Civil Service employees who spend the majority of their careers abroad. But there was and is a rational basis for the distinction, and the Foreign Service mandatory retirement age therefore is constitutional.

1. Employment in the Foreign Service is characterized by frequent and extensive changes in environment, often accompanied by exposure to unfamiliar and unfavorable living conditions. Congress recognized the special stresses of a diplomatic career in 1924, when it created the Foreign Service and established a mandatory retirement age below that applicable to other federal employees. In the ensuing 54 years, the legislature has repeatedly reaffirmed the judgment that the unique burdens and pressures on Foreign Service personnel make compulsory retirement at a relatively early age desirable. This judgment is amply supported by the actual experience of Foreign Service employees, who typically spend more than half their careers overseas and a significant portion of that time at hardship posts. Congress could therefore rationally conclude that Foreign Service

employees should be covered by a separate retirement system with an especially early mandatory retirement age.

2. The mandatory retirement age in the Foreign Service Retirement System is an integral part of the personnel management program for Foreign Service Officers established by the Foreign Service Act of 1946. The Act reduced the mandatory retirement age to 60 in conjunction with the adoption of the "rank-in-person" structure for the Foreign Service. Foreign Service Officers are classified, not by the particular position in which they serve, but on the basis of their personal qualifications and the level of responsibility for which their previous training and experience have prepared them.

Together with the "rank-in-person" structure, the 1946 Act instituted the process of "selection-out," by which Officers who fail to achieve promotion within a specified number of years or whose performance falls substantially below that of their peers may be removed from the Service. "Selection-out" is designed to force attrition at a rate greater than would be produced by normal retirement and thus to provide increased promotion opportunities at all Officer levels in the Foreign Service.

The mandatory retirement age helps to achieve this goal by requiring Officers who have reached the summit of their careers to retire after serving for several years in posts of high responsibility. Mandatory retirement thereby ensures a steady number of openings at the upper levels of the Foreign Service and allows the "selection-out" program to operate as it should. By guaranteeing the availability of a sequence of promotions for exceptional Officers, "selection-out" and mandatory retirement create incentives for superior performance and provide attractive career prospects for qualified young persons. Congress was therefore entitled to conclude that a mandatory retirement age of 60 is rationally related to the legitimate purpose of maintaining a competent and professional diplomatic corps.

3. Appellees' attack on the Foreign Service mandatory retirement age ignores the fact that the compensation package received by Foreign Service personnel differs in numerous respects from that received by Civil Service employees. Foreign Service employment entails a distinct combination of benefits and obligations. Appellees should not be permitted to dispense with the one aspect of the Foreign Service system that they find unfavorable while retaining all the advantages that the system offers. If the district court's decision is not reversed, a series of lawsuits by dissatisfied federal employees could eventually result in the elimination of any distinction between the Foreign Service and the Civil Service. This outcome would be appropriate only if Congress had no rational basis for creating that distinction in the first place. As indicated above, however, special provisions for the Foreign Service are justified both by the unique nature of Foreign Service work and by the needs of the Service's personnel program.

ARGUMENT

THERE IS A RATIONAL BASIS FOR REQUIRING PERSONS COVERED BY THE FOREIGN SERVICE RETIREMENT SYSTEM TO RETIRE AT AGE 60, AND SECTION 632 THEREFORE DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307, 312, held that "rationality is the proper standard by which to test whether compulsory retirement at [a particular] age * * * violates equal protection." Applying the rational basis standard, the Court in *Murgia* sustained a state law requiring uniformed state police officers to retire at age 50. Legislative history canvassed by the Court indicated that the State's purpose in enacting the mandatory retirement provision was "to protect the public by assuring physical preparedness of its uniformed police" (*id.* at 314 and n. 7). The Court reasoned that "[s]ince physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective" (*id.* at 315).

The Court acknowledged that some persons older than 50 might be able adequately to perform the tasks of a uniformed state police officer, but it concluded that the challenged statute's exclusion of such persons did not prevent the retirement age from being rationally related to the State's legitimate pur-

pose. The Court concluded (*id.* at 316; footnote omitted):

> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U.S., at 485.

See also *McIlvaine* v. *Pennsylvania State Police*, 454 Pa. 129, 309 A. 2d 801, appeal dismissed for want of a substantial federal question, 415 U.S. 986; *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D. D.C.), summarily affirmed, 420 U.S. 940 (upholding mandatory retirement of Civil Service employees at age 70).

In attacking the Foreign Service mandatory retirement age, appellees in this case advance an argument slightly different from that rejected by the Court in *Murgia*. Appellees do not contend that the Constitution bars Congress from establishing a mandatory retirement age for Foreign Service employees.[8] Nor

[8] The three-judge district court thought initially that appellees wished to challenge the constitutionality of mandatory retirement generally, even if only imposed at age 70. The court rejected that perceived challenge in a footnote to its original opinion (J.S. App. 3A n. 4), but, on being informed

do they maintain that Congress could not rationally choose to set that age at 60. Rather they argue that the equal protection component of the Due Process Clause precludes the legislature from establishing one mandatory retirement age for Foreign Service personnel and another for Civil Service personnel.[9] Appellees are wrong. The congressional decision to create different retirement systems with different mandatory retirement ages for the Foreign Service and the Civil Service is supported by an articulated rational basis and should be sustained.[10]

A. Congress has required Foreign Service employees to retire at an earlier age than Civil Service employees because of the uniquely demanding nature of Foreign Service work.

1. Since the creation of the Foreign Service in 1924,[11] persons covered by the Foreign Service Retire-

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by appellees that no such argument had been intended, the court struck all but the first sentence of the footnote in question (order of July 28, 1977).

[9] In light of Congress' recent repeal of the mandatory retirement age provision previously applicable to Civil Service employees (see note 5, *supra*), appellees' argument is tantamount to a contention that Congress may not now enforce compulsory retirement of Foreign Service employees at any age.

[10] A rational basis need not be "articulated" by the legislature. See *McGowan* v. *Maryland*, 366 U.S. 420, 425-426. But where, as here, the legislature has set out several reasons for its decision, and has adhered to its course after repeated reexaminations during more than 50 years, the case for the statute's constitutionality is all but overwhelming.

[11] Act of May 24, 1924, 43 Stat. 140.

ment System have been required to retire at an earlier age than Civil Service personnel. Congress enacted the first general retirement system for federal employees in 1920. The statute established a mandatory retirement age of 70 for most Civil Service employees who had rendered at least 15 years of service,[12] but this age limit did not apply to employees in the Diplomatic and Consular Services. When Congress subsequently decided to reorganize the Diplomatic and Consular Services into a single Foreign Service, the creation of a retirement system for Foreign Service Officers was one of the most important goals of the reorganization effort.[13] The 1924 Act establishing this system fixed the age of retirement for Foreign Service Officers at 65.[14]

In the following colloquy on the floor of the House of Representatives (65 Cong. Rec. 7564-7565 (1924)), the principal sponsor of the 1924 legislation (Rep. Rogers) explained that Foreign Service Officers would

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[12] Act of May 22, 1920, 41 Stat. 614. The mandatory retirement of Civil Service employees at age 70 was sustained against a constitutional challenge in *Weisbrod* v. *Lynn*, *supra*.

[13] See H.R. Rep. No. 157, 68th Cong., 1st Sess. 7, 10, 16, 18 (1924); Hearings on H.R. 17 and H.R. 6357 (Foreign Service of the United States) before the House Committee on Foreign Affairs, 68th Cong., 1st Sess. 15, 127, 165-166 (1924).

[14] "When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service he shall be retired: *Provided*, That the President may in his discretion retain any such officer on active duty for such period not exceeding five years as he may deem for the interest of the United States." 43 Stat. 144.

be required to retire five years earlier than Civil Service employees because Foreign Service Officers, like military personnel but unlike most Civil Service employees, commonly were rotated among remote posts overseas and frequently experienced disruptive changes in their way of life.

> Mr. ROGERS of Massachusetts. * * * I think the analogy of the foreign service officer to the Army officer and to the naval officer is much more complete than to the civil-service employee in Washington.
>
> The foreign-service officer is going hither and yon about the world, giving up fixed places of abode, often rendering difficult and hazardous service of prime importance to the United States.
>
> * * * * *
>
> Mr. CELLER. You are making the retiring age 65 years?
>
> Mr. ROGERS of Massachusetts. Sixty-five.
>
> Mr. CELLER. And the clerk in Washington in the field service is retired at 70 years of age?
>
> Mr. ROGERS of Massachusetts. There is added a provision that the Secretary of State may retain any man for five years if he finds it wise for the country so to retain him.
>
> I call to the attention of the gentleman the fact that the kind of service which these men must render involves going to the Tropics; it involves very difficult and unsettling changes in the mode of life. The consensus of opinion was that the country was better off to retire them, as a general rule, at 65. [Applause.] [15]

The 1924 Act has been amended several times,[16] but Congress has adhered to its determination that Foreign Service employees should be required to retire at a lower age than civilian employees generally. In 1941, for example, Congress authorized the Secretary of State to compel the retirement at full pension of Foreign Service Officers who were at least 50 years old and had rendered 30 years' service, or to compel the retirement at partial pension of Officers who were at least 50 and had rendered 15 years' service (55 Stat. 189). This provision has since been repealed (60 Stat. 1038), but its legislative history demonstrates Congress' consistent assessment of the effects of overseas work on Foreign Service personnel. Both the House and Senate committee reports reprinted a letter from Secretary of State Hull, which stated (S. Rep. No. 168, 77th Cong., 1st Sess. 2 (1941); H.R. Rep. No. 389, 77th Cong., 1st Sess. 3 (1941)):

> Whereas it is well known that in all walks of life the age at which different individuals no longer find it possible to continue their maximum

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[15] Some members of Congress opposed the lower retirement age established in the Rogers bill and offered an amendment that would have set the mandatory retirement age for Foreign Service Officers at 70. The amendment was rejected. 65 Cong. Rec. 7586 (1924).

[16] Indeed, the Act was completely rewritten in 1946, and the mandatory retirement age for Foreign Service Officers was lowered to 60 (60 Stat. 1015). See pages 26-31, *infra*.

volume of work and activity, or to carry heavy responsibility with effectiveness, varies materially, experience has shown that the continued strain of 30 years or more of service representing this Government in foreign countries in widely different climates and environments makes it desirable both from the standpoint of the Government and of officers that retirements should be authorized by law, commencing at a minimum of 50 years of age.

* * * [T]he Foreign Service is in many respects the most hazardous of the permanent commissioned services of this Government, when this country is not actually engaged in war. Foreign Service officers and their families are, even when the United States is at peace, not only subject to unhealthful conditions and extremes of climate (often without having suitable medical facilities available) but they are also subject to all the dangers of foreign wars, of civil strife in foreign countries, and of major catastrophes. * * *

The special nature of Foreign Service work was similarly emphasized in the 1954 report to Congress by the Committee on Retirement Policy for Federal Personnel, a statutorily created body (66 Stat. 723) charged with the responsibility of making a comparative study of all retirement systems for all federal employees. Congress directed the Committee to include in its report an evaluation of "the necessity for special benefit provisions for selected employee groups, including overseas personnel" (*ibid.*). The Committee mentioned the lower compulsory retirement age of Foreign Service Officers and noted that this and

other distinctive provisions had been "enacted in recognition of the needs of a career service and of the disadvantages of employment abroad." S. Doc. No. 89, 83d Cong., 2d Sess. 21 (1954). The Committee also provided a more detailed description of the unusual factors that had prompted Congress to confer preferential retirement treatment on Foreign Service employees. The Committee stated (*id.* at 280-281):

> Foreign Service as compared with service in the United States has many disadvantages which may be grouped in three categories. (1) Financial, (2) occupational hazard, and (3) post-retirement.
>
> * * * * *
>
> Disadvantages arising out of occupational hazards relate to such matters as unfavorable climate; lack of proper health facilities; exposure to diseases; risks arising out of foreign wars, riots, insurrection, and civil commotion and sometimes assault or assassination.
>
> Psychological pressures, especially for employees with families, are frequently built up as a result of encountering and combating such hazards. They may also arise out of such factors as the repeated readjustment for the employees and their families to new environments—particularly where unfamiliarity with the local language and customs adds a complication—and continuous lack of private life and opportunity for relaxation because of the unavoidable "goldfish bowl" existence.

See also *id.* at 238-239, 273-274; Committee Print, House Committee on Foreign Affairs, The Foreign

Service—Basic Information on Organization, Administration, and Personnel, 84th Cong., 1st Sess. 105-116 (1955).

2. As originally designed, the Foreign Service Retirement System covered only Foreign Service Officers in the Department of State. Congress extended the coverage of the Foreign Service Retirement System between 1960 and 1976. It now includes not only persons at the Officer level in the International Communication Agency and the Agency for International Development, but also Foreign Service staff employees at the State Department, ICA, and AID.[17] The vast majority of Foreign Service personnel are now entitled to benefits under the Foreign Service Retirement System. While it was expanding the system's coverage, Congress periodically reaffirmed its earlier conclusion that Foreign Service employees should be subject to an earlier mandatory retirement age than Civil Service employees.

For example, in 1960, when a large group of technical, administrative, fiscal, clerical, and custodial employees of the Foreign Service were transferred into the Foreign Service Retirement System, Congress noted that this system "is designed to give recognition to the need for earlier retirement age for career Foreign Service personnel who spend the majority of their

[17] 74 Stat. 838; 82 Stat. 812, 814; 87 Stat. 722-723; Pub. L. 94-350, 90 Stat. 834, 842.

working years outside the United States adjusting to new working and living conditions every few years." [18]

A 1966 Cabinet Committee study of federal staff retirement systems, submitted to Congress as an appendix to the annual report of the Bureau of the Budget and the Civil Service Commission on federal statutory salary systems, contains a similar discussion. S. Doc. No. 14, 90th Cong., 1st Sess. (1967). That study states (*id.* at 112):

> The mandatory retirement age of 60 is set in recognition of the need to maintain the Foreign Service as a corps of highly qualified individuals with the necessary physical stamina and intellectual vitality to perform effectively at any of some 300 posts throughout the world including those in isolated, primitive, or dangerous areas.

The decision to extend the Foreign Service Retirement System to career Foreign Service employees of the International Communication Agency in 1968 and the Agency for International Development in 1973 also demonstrates congressional recognition of the special stresses of an overseas career. The House report on the latter measure declared that the Foreign Service Retirement System "provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service." [19]

[18] H.R. Rep. No. 2104, 86th Cong., 2d Sess. 31 (1960).

[19] H.R. Rep. No. 93-388, 93d Cong., 1st Sess. 46 (1973). Referring to the special characteristics of AID's statutory mission, the report also stated (*id.* at 48): "AID operates only in the less developed countries. Hence its Foreign Ser-

Finally, congressional sensitivity to the unique requirements of the Foreign Service is reflected in the exclusion of Foreign Service employees from the 1978 amendments to the Age Discrimination in Employment Act (see note 5, *supra*). Those amendments repealed the statutory provision that had required most Civil Service employees to retire at age 70 (5 U.S.C. 8335(a)). The bill originally introduced in the House would have amended Section 15(a) of the Age Discrimination in Employment Act, 29 U.S.C. (Supp. V) 633a(a), to read: "Notwithstanding any other provision of Federal law relating to mandatory retirement requirements * * *, all personnel actions affecting employees * * * in executive agencies * * * shall be made free from any discrimination based on age" (H.R. 5383, 95th Cong., 1st Sess. 5 (1977); see H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 5-6, 11-12 (1977)).[20] If it had been adopted, this proposal would have eliminated mandatory retirement ages not only

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vice personnel spend almost their entire working years in posts that are designated hardship posts. The transfer of its personnel to the Foreign Service Retirement System should encourage those who meet the age and service requirements to seek earlier retirement."

[20] In addition, the bill would have amended Section 15(b) of the Act, 29 U.S.C. (Supp. V) 633a(b), to preclude the Civil Service Commission from granting any exemption that would permit any department or agency "to observe the terms of any seniority system or any employee benefit plan such as a retirement, pension, or insurance plan, if such system or plan includes any provisions which require the retirement of any employee because of the age of such employee" (H.R. 5383, *supra*, at 5-6).

in the Foreign Service, but also in the Central Intelligence Agency, the Postal Service, the Federal Aviation Agency, and a number of other federal entities.

During debate on the floor of the House, Rep. Spellman introduced an amendment intended generally "to avoid the possibility of wholesale error in dealing with erasing mandatory age requirements" and, in particular, to "leave intact the existing retirement provisions applicable to Foreign Service personnal [sic]" (123 Cong. Rec. H9969 (daily ed., September 23, 1977)). Rep. Zablocki, Chairman of the House Committee on International Relations, spoke in support of the Spellman amendment and asserted his committee's "primary jurisdiction" over the Foreign Service. He pledged that the Committee on International Relations would "review the retirement provisions affecting the Foreign Service at the earliest possible date" (*ibid.*). The Spellman amendment was adopted, and only the mandatory retirement provision applicable to the Civil Service was repealed (*ibid.*; see H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 10-11 (1978)).

3. Congress has thus repeatedly articulated a rational basis for establishing a special mandatory retirement age for Foreign Service personnel and has recently demonstrated its intention to continue to treat Foreign Service retirement issues separately from retirement issues concerning other federal employees. The legislative judgment that the Foreign Service should be covered by a distinct retirement system that includes a mandatory retirement age of 60 is amply

supported by an examination of the characteristics of a Foreign Service career. Foreign Service Officers must be physically and mentally prepared to make difficult discretionary decisions that may affect the foreign relations of the United States. The perils and discomforts to which Foreign Service personnel are exposed have not materially diminished since 1941 when Secretary Hull wrote of the "unhealthful conditions," the "extremes of climate," and the "dangers of foreign wars, of civil strife in foreign countries, and of major catastrophes" (see page 16, *supra*). American diplomatic missions have been established in an increasing number of disadvantaged countries, and the threat of terrorist activity has grown in many areas. State Department statistics indicate that there are now 187 hardship posts to which Foreign Service personnel may be assigned and that a typical Foreign Service career employee can expect to spend approximately one-fourth of his or her working years at such posts.[21] Of the Foreign Service personnel abroad at any given time, nearly 50 percent are serving in hardship locations.

The Foreign Service is unique in the worldwide mobility of its employees. They must be ready to serve anywhere and are required by law to devote a substantial part of their careers to overseas duty. Approximately 60 percent of all Foreign Service em-

[21] Because AID maintains a higher percentage of hardship posts than the State Department or ICA, AID Foreign Service employees can expect to spend a greater portion of their careers—approximately one-half—in such difficult locations.

ployees are overseas at any given time.[22] Under Section 571 of the Foreign Service Act, 22 U.S.C. 961, Foreign Service employees may be assigned to domestic posts for more than eight consecutive years only on the personal decision of the Secretary of State.[23] Foreign Service employees must be on call to relocate, to hazardous places, at a moment's notice. They must serve in hardship posts whenever the needs of the Service dictate, not when they choose.

There is no similar presumption that persons in any of the employment categories cited by the district court (J.S. App. 4A-6A) will serve overseas for extended periods. Peace Corps volunteers are not career employees; in fact they are not government employees at all, except for very limited purposes. The Foreign Agricultural Service has only a few employees overseas, and they serve abroad at their option.[24]

[22] Defendants' Response to Request for Information, Exh. 5.

[23] Section 571, 22 U.S.C. 961, provides: "Any officer or employee of the Service may, in the discretion of the Secretary, be assigned or detailed for duty in any Government agency, * * * such an assignment or combination of assignments to be for a period of not more than four years, except that under special circumstances the Secretary may extend this four-year period for not more than four additional years: *Provided*, That in individual cases when personally approved by the Secretary further extension may be made." The Department of State is a "Government agency" within the meaning of this statute. See H.R. Rep. No. 2508, 79th Cong., 2d Sess. 74-76 (1946).

[24] 286 Department of Agriculture employees were located in foreign countries in 1975; only 82 of these were in hardship posts. Defendants' Supplementary Memorandum with Respect to Defendants' Response to Request for Information, pp. 4-6. 4,611 participants in the Foreign Service Retirement System

Similarly, persons who work for the Agency for International Development on a contract basis have no career obligations and are not required to remain overseas for longer than the contract period. Approximately 30,000 Civil Service employees work overseas for the Department of Defense, but departmental regulations limit the overseas tenure of most of these employees to five years.[25] The percentages of Civil Service and Foreign Service employees overseas at any given time differ by an order of magnitude.[26]

Congress thus had good reason to create a separate Foreign Service Retirement System with a mandatory

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were abroad in 1975 (Defendants' Response to Request for Information, Exh. 5). Currently, approximately 6,700 participants in the Foreign Service Retirement System are serving abroad. The major portion of this increase is attributable to the Foreign Service Retirement Amendments of 1976 (90 Stat. 834, 846-847), which repealed the requirement that Foreign Service staff employees accumulate ten years of continuous service as a precondition to coverage under the Foreign Service Retirement System (see 22 U.S.C. (1970 ed.) 1063(c), 1229(b)).

[25] Department of Defense Instruction 1404.8 (1968).

[26] The district court's opinion suggests (J.S. App. 4A-5A) that there are approximately 50,000 American civilians who work for the government abroad and who are not covered by the Foreign Service Retirement System. The United States Civil Service Commission Preliminary Report on Civil Service Retirement (Fiscal Year 1977) indicates that the actual figure is twice that large and that, if employees in United States Territories are considered, the figure rises to 134,000 (see Table A-6). The Report also indicates, however, that the total number of Civil Service employees is approximately 2.85 million (*ibid.*). Thus, the percentage of Civil Service employees overseas is at most 4.7 percent. That is not remotely comparable to the corresponding 60 percent figure for Foreign Service personnel.

retirement age lower than that applicable to the Civil Service. The decision to place that age at 60 is no more objectionable than the decision of Massachusetts, upheld in *Murgia*, to require uniformed state police officers to retire at age 50. Increasing age brings with it increasing susceptibility to physical difficulties, and the fact that the individual appellees may be able to perform their tasks is no more dispositive here than in *Murgia*. In recognition of the special features of Foreign Service work, Congress determined that the use of a mandatory retirement age "rationally furthers some legitimate, articulated state purpose" (*McGinnis* v. *Royster*, 410 U.S. 263, 270). That conclusion is a permissible exercise of legislative judgment; it should not be overturned on judicial review because a court disagrees, as a policy matter, with Congress' decision. See, *e.g.*, *Whalen* v. *Roe*, 429 U.S. 589; *Weinberger* v. *Salfi*, 422 U.S. 749.

The most that can be said for appellees' position is that Congress also might have had good reason to require all federal employees who spend significant portions of their careers abroad to retire at 60.[27] But that would have created awkward problems for the administration of the Civil Service and its retirement system, and Congress is not constitutionally required to prescribe a special retirement age for these employees in order to be able to deal effectively with the Foreign Service. Congress may attend to the special

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[27] Indeed, in its successive expansions of the coverage of the Foreign Service Retirement System, Congress has required early retirement for identifiable groups of overseas employees whose service abroad is of a character and duration similar to that of Foreign Service Officers in the Department of State.

problems facing the Foreign Service without imposing similar measures everywhere else they may be desirable or appropriate. See *Califano* v. *Jobst*, 434 U.S. 47, 56-58; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

B. Congress has established a lower mandatory retirement age for Foreign Service employees as part of a special personnel management system designed to ensure a high level of competence in the United States diplomatic corps.

In the Foreign Service Act of 1946, 60 Stat. 999, Congress introduced a new personnel structure within the Foreign Service and, concomitantly, revised the Foreign Service Retirement System. The reform was intended to produce a "disciplined and mobile corps of trained men * * * through entry at the bottom on the basis of competitive examination and advancement by merit to positions of command." H.R. Rep. No. 2508, 79th Cong., 2d Sess. 1 (1946). Congress sought to provide for "more rational and effective deployment of personnel according to natural aptitude, training, interest, and experience" and thereby to end the existing "conspicuous waste of manpower." *Id.* at 3. The basic tool chosen by the legislature to accomplish these purposes was the "rank-in-person" structure of the Foreign Service.

The grade assigned to a Civil Service employee depends directly on the job description of the position in which he or she is employed. Foreign Service Officers, by contrast, are classified on the basis of "a definition of the qualifications expected of officers of a given class and the level of responsibility at which

they will be required to work." *Id.* at 7. Rank attaches to a given Officer rather than to a given job. Foreign Service Officers are hired not to fill a particular post, but for their long-term career potential. They are promoted by merit from rank to rank as they gain experience. The system is characterized by frequent transfers from job to job and country to country; it is designed not just to ensure that necessary tasks are performed but to develop leaders through exposure to varied experiences and steadily more difficult challenges. The system prepares and helps to identify the best Officers for service at ambassadorial and other high levels.

As part of the 1946 restructuring, Congress created a "selection-out" procedure for Foreign Service Officers. Officers are ranked in "classes" and required to retire if they do not secure promotion within a specified number of years. The "selection-out" device is intended to "force attrition in a career service at a more rapid rate than is achieved by ordinary retirements" in order to guarantee "that Foreign Service officers shall be promoted by selection on the basis of merit." H.R. Rep. No. 2508, *supra*, at 85. Each year selection boards are convened under Section 623 of the Act, 22 U.S.C. 993, to make a worldwide comparison within each class of Foreign Service Officers, Foreign Service Information Officers, and Foreign Service Reserve Officers with unlimited tenure and to identify those ready for promotion to the next rank. Officers whose performance has fallen substantially below that of their peers or who have failed to achieve promotion

within the time allotted may be selected out, as Section 633 of the Act, 22 U.S.C. 1003, and the Secretary's regulations provide.

In the 1946 personnel system revision, Congress reduced to 60 the mandatory retirement age for Foreign Service Officers below the rank of career minister.[28] The new retirement age corresponded to the approximate age projected for the most senior Officers in Class 1, the rank immediately below career minister. H.R. Rep. No. 2508, *supra*, at 92. Class 1 Officers were not subject to selection-out, because the mandatory retirement provisions were expected to produce the desired turnover in that class. *Id.* at 91.[29]

The legislative history reveals that Congress followed the model of the United States Navy in devising the new Foreign Service personnel system. This Court described the Navy's statutorily created system of promotion and attrition, embodying the same "up or out" philosophy reflected in the Foreign Service's selection-out system, in *Schlesinger* v. *Ballard*, 419 U.S. 498. In sustaining the Navy's program, this Court noted that, without mandatory attrition devices, younger officers would not often be promoted and an

[28] Under the 1946 statute, career ministers remained subject to mandatory retirement at age 65. In the Foreign Service Retirement Amendments of 1976, Pub. L. 94-350, 90 Stat. 846, the mandatory retirement age for career ministers was lowered to 60.

[29] Class 1 officers were made subject to selection-out in 1955 (69 Stat. 25-26). In 1955 Congress also created a new class of Foreign Service Officers called "career ambassadors," one rank above career ministers. The mandatory retirement age for career ambassadors was fixed at 65 (69 Stat. 537).

important incentive to superior performance would be removed. *Id.* at 502. The Court further observed that operation of the "up or out" program "results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command." *Id.* at 510.

The Foreign Service Retirement System uses both selection-out and the mandatory retirement age to help it build and maintain a high-quality diplomatic corps. Neither part of the system is sufficient by itself. The selection-out program has its major effects on younger employees, and the mandatory retirement age creates "room at the top" so that there is a steady supply of promotion opportunities for the younger employees who must be promoted to stay in the service.[30]

As suggested previously (see note 9, *supra*), in light of the recent amendments to the Age Discrimination in Employment Act, appellees' contention that a mandatory retirement age applicable to the Foreign Service must be identical to that applicable to the Civil Service is essentially an argument for eliminating the Foreign Service mandatory retirement age altogether. Such a development, or even postponement of mandatory Foreign Service retirement until age 70,

[30] As the court of appeals observed in *Johnson* v. *Lefkowitz*, 566 F. 2d 866, 869 (C.A. 2), "[a] mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and to progress through the ranks."

would detract significantly from the continued effectiveness of the Retirement System in personnel management.

Statistics compiled by the Department of State show that as of June 30, 1978, there were 110 members of the Officer corps of AID, ICA, and the State Department who had reached age 60 and who would have been subject to mandatory retirement but for the district court's order. Projections indicate that this figure will reach 159 by December 31, 1978. As more Officers postpone their retirement beyond age 60, the opportunities available for advancement within the ranks of the Foreign Service decrease. The fewer such opportunities are available, the fewer promotions are available for younger Officers and the less useful selection-out becomes as a means of encouraging and rewarding superior performance and of attracting the most able applicants to Foreign Service careers. In short, the Foreign Service personnel system is an integrated whole, and in order for selection-out to work as it should, it must be accompanied by the mandatory retirement age set by Congress.[31]

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[31] Moreover, mandatory retirement may sometimes serve as a more palatable alternative to selection-out where the latter course, though objectively indicated, appears too harsh in an individual case for a long-term employee. When a senior Officer is no longer performing at an acceptable level but is nearing mandatory retirement, the selection-out procedures may be held in abeyance with no irreparable detriment to the Service and no loss of face to the employee who has rendered years of valued service. As the 1966 Cabinet Committee study of federal retirement systems concluded, "Retirement at age 60 * * * enhances the advancement opportunities of the most effective younger personnel and reduces the strain on the selection-out program * * *." S. Doc. No. 14, 90th Cong., 1st Sess. 112 (1967).

It was therefore rational for the legislature to conclude that normal attrition, even when supplemented by selection-out and inducements to early voluntary retirement, would not ensure satisfactory promotion prospects throughout the system. Experience in the brief period following the district court's decision has confirmed the accuracy of Congress' judgment. Promotions, especially at the upper levels of the Foreign Service, have slowed drastically, because persons who were expected to retire have not done so. The longer this situation persists, the greater the difficulty the Foreign Service will experience in retaining competent mid-level Officers and in recruiting highly qualified persons to enter the Service at the bottom. Congress set the mandatory retirement age for Foreign Service Officers at 60 because it determined that, by that age, most Officers would have attained their highest career positions and served in them for several years. The legislature thus sought to obtain the maximum possible benefit from the talent and experience of each individual Officer while at the same time honoring the Service's institutional need for continued turnover in upper echelon positions. The choice is rational and should be sustained.

C. Appellees' selective challenge to a single allegedly undesirable feature of the Foreign Service Retirement System disregards the numerous special advantages conferred on Foreign Service personnel under that system.

The Civil Service and Foreign Service retirement systems are different in many respects other than mandatory retirement age. For example, retired Foreign Service employees receive an annuity computed at two percent of the highest average salary for three consecutive years, multiplied by the number of years of service; retired Civil Service employees, by contrast, receive an annuity computed at 1½ percent of salary for the first five years of service, 1¾ percent for the next five years, and two percent for the remaining years. Compare 22 U.S.C. 1076 with 5 U.S.C. 8339(a). Foreign Service personnel with 20 years' service may elect to retire at age 50, but Civil Service employees with 20 years' service cannot normally retire until age 60. Compare 22 U.S.C. 1006 with 5 U.S.C. 8336. For a full comparison of the features of the Foreign Service and Civil Service retirement systems, see United States Civil Service Commission Report, *Income Protection Programs for Federal Employees*, Pt. 3, 39-59 (1977).[32]

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[32] In addition to the numerous differences between the two retirement systems, there are a variety of other noteworthy distinctions between Foreign Service employment and Civil Service employment. Perhaps the most obvious of these are the different pay scales and promotion patterns that apply in the two services.

Foreign Service pay ranges from $8,902 to $58,245 annually, whereas Civil Service pay ranges from $6,219 to $58,245. Executive Order No. 12010, 42 Fed. Reg. 52365. (Under 5 U.S.C. 5308, however, the pay actually received may not exceed $47,500.) The Civil Service does not use selection-out or any comparable personnel management tool. On the other hand, the percentage of Foreign Service Officers in the highest pay classes exceeds the percentage of Civil Service employees in the highest pay grades. Indeed, the Department of State has computed that the proportion of Foreign Service Officers in the two highest pay steps exceeds the proportion of Civil Service employees in the three highest pay steps.

The Foreign Service also has its own personnel grievance system (22 U.S.C. 1037-1037c), its own statutory procedure for separation for cause (22 U.S.C. 1007), and its own unique employee-management relations program under Executive Order 11636, 36 Fed. Reg. 24901.

The retirement benefits available to Foreign Service personnel have been adjusted in part to take account of the early mandatory retirement feature of the Foreign Service Retirement System.[33] Appellees, apparently satisfied with the remaining aspects of Foreign Service employment, have challenged only the statutory requirement that they and other Foreign Service personnel retire at age 60. The present case thus represents an attempt by some Foreign Service

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[33] In 1954 the independent Committee on Retirement Policy for Federal Personnel reported to Congress that it generally preferred increased active duty pay and allowances to special retirement benefit plans as a way of compensating employees for hazardous or arduous duties or service at inconvenient or unhealthful locations. The Committee conceded, however, that where a formally established personnel system provides for involuntary separation in the interest of the government, either through "promotion and selection-out" procedures or through mandatory retirement at a relatively young age, special benefit provisions might be appropriate. See S. Doc. No. 89, 83d Cong., 2d Sess. 18 (1954).

employees to improve their lot by eliminating a condition of employment that they see as less favorable than the comparable Civil Service rule, while retaining the conditions of employment that are more favorable than the comparable Civil Service conditions.

The district court, observing that the overseas careers of some civil servants are similar to those of foreign servants, ruled that Congress could not constitutionally maintain different mandatory retirement ages for the two groups. This reasoning would apply equally to any of the terms or conditions of employment as to which the Civil Service and Foreign Service differ. If upheld, the district court's decision could lead to invalidation on equal protection grounds of all distinctions between the Civil Service and the Foreign Service. The decision thus calls into question the constitutionality of legislation creating a separate Foreign Service, with its own combination of benefits and obligations.

Whenever Congress establishes a separate service,[34] there are bound to be some differences in the terms and conditions of employment between that service and the regular Civil Service. Promotion patterns will be different; pay will be different; retirement is likely to be different. These differences can and often do offset each other, so that each group of employment

[34] In addition to the Foreign Service and the military services, the Postal Service, the Public Health Service, the Central Intelligence Agency, and several other special services have been established by Congress.

benefits and obligations is of approximately equal attractiveness to employees. Unless it is possible to conclude that all such distinctions are irrational—indeed, that decisions to create such separate services are irrational—it is insupportable for the district court to have "corrected" the one condition to which appellees object without regard to the other conditions in the Foreign Service employment "package" that appellees enjoy.[35] But, for the reasons discussed above, it was not irrational for Congress to determine that the Foreign Service and the Civil Service should be treated differently in some respects.

[35] Cf. *Kelley* v. *Johnson*, 425 U.S. 238, which holds that governments have especially broad powers in regulating the terms of their dealings with their own employees. Here, as in *Kelley*, the particular rule to which appellees object "cannot be viewed in isolation, but must be rather considered in the context of the [nation's] chosen mode of organization for its [Foreign Service]" (*id.* at 247).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

PETER BUSCEMI,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys.

HERBERT J. HANSELL,
Legal Adviser,
Department of State.

MICHAEL A. GLASS,
General Counsel,
International Communication Agency.

JULY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269803 75